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No. 96-1366

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

IN RE Judy Madsen Johnson, Ed Martin, Shirley Hobbs, and Rescue America

Petitioners,

On Petition for Writ of Mandamus to the Eighteenth Judicial Circuit Court of Florida

BRIEF OF RESPONDENTS WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., EPOC CLINIC, INC., AND CENTRAL WOMEN'S HEALTH ORGANIZATION, INC., IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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STATEMENT OF THE CASE

The injunction being challenged in this case was issued in March, 1993 by the Eighteenth Judicial Circuit Court of Florida. The injunction was issued in response to violations of a previous injunction, which failed to prevent petitioners from impeding access to the Aware Woman Center for Choice, Inc., in Melbourne, Florida (hereinafter "the clinic"). *See Madsen v. Women's Health Center, Inc.*, 114 S.Ct. 2516, 2521 (1994). During three days of evidentiary hearings, the Circuit Court heard extensive evidence regarding the activities of petitioners and those acting in concert with them. These activities included the harassment of the patients and medical personnel of the clinic, the blocking of traffic to and from the clinic, and "the confrontation of minor children of clinic employees who were home alone." *Madsen*, *supra*, 114 S.Ct. at 2521.

After the Florida Supreme Court upheld the injunction, this Court granted petitioners' writ of certiorari, and issued the opinion that is the subject of the present petition. *Madsen*, *supra*, 114 S.Ct. 2516. In *Madsen*, this Court rejected petitioners' claim that the injunction is an impermissible prior restraint of petitioners' speech. *Madsen*, *supra*, 114 S.Ct. at 2524 n.2 This Court also rejected petitioners' claim that the injunction is a content-based regulation of speech. On the contrary, the Court noted, "the state court imposed restrictions on petitioners incidental to their antiabortion message because they repeatedly violated the court's original order." *Madsen*, *supra*, 114 S.Ct. at 2523-24. Thus, this Court treated the injunction as a content-neutral regulation of the time, place, and manner of petitioners' speech.

Because injunctions and general ordinances affect speech in different ways, the Court held that a "somewhat more stringent application of general First Amendment principles" applies to injunctions. In particular, the Court modified the "narrow tailoring" component of the time, place, and manner standard, *see Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), to require a showing that an injunction "burden[s] no more speech than necessary to serve a significant government interest." *Madsen*, *supra*, 114 S.Ct. at 2525.

Applying this standard to the injunction issued by the Florida trial court, this Court endorsed the Florida Supreme Court's findings that the injunction was justified by several significant governmental interests. These interests included "protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy, . . . ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks, . . . [and] protecting the property rights of all its citizens." *Madsen*, *supra*, 114 S.Ct. at 2526. The Florida Supreme Court also noted the strong state interest in residential privacy. *Id.* This Court held that "We agree with the Supreme Court of Florida that the combination of these governmental interests is quite sufficient to justify an appropriately tailored injunction to protect them." *Id.*

After holding that the evidence provided a justification for regulating petitioners' conduct, the Court then turned to consider the specific provisions of the injunction. This consideration was necessarily limited because petitioners had not included a full factual record as an appendix in the Florida Supreme Court, and had never certified a full record. *Madsen*, *supra*, 114 S.Ct. at 2527-

28. In their *Madsen* appeal, petitioners chose to rely on a facial challenge to the injunction and "studiously refrained from challenging the factual basis for the injunction both in the state courts and here." *Madsen*, *supra*, 114 S.Ct. at 2527.

Based on the incomplete record before it, this Court upheld some provisions of the injunction against petitioners' facial challenge and rejected other provisions as burdening more speech than necessary based on "the record before us." *Madsen*, *supra*, 114 S.Ct. at 2528; *id.* at 2530. The modifications to the injunction that are the basis of the present petition are the product of a much more detailed record than this Court has yet seen. The trial court has applied this Court's instructions to the full facts in the original record, and produced a narrower, more carefully focused injunction.

The particular provisions challenged by petitioners will be addressed briefly below. *See infra* pp. 13-20. However, it is inappropriate to undertake the necessarily fact-bound and subtle review of these provisions in the context of a petition for a writ of mandamus. A writ of mandamus is not justified in this case.

The Modified Amended Permanent Injunction challenged by petitioners was entered on November 27, 1997. Petition for Writ of Mandamus ("Petition"), Appendix C. On December 24, 1996, petitioners filed a Notice of Appeal with the Florida Circuit Court. (Copies of petitioners' Notice of Appeal have been lodged with the Supreme Court Clerk's Office.) On March 6, 1997, petitioners filed a motion to request a record on appeal. (Copies of this motion have also been lodged with Supreme Court Clerk's Office.) In their state court appeal, petitioners may raise each of the claims they now at-

tempt to bring before this Court through the extraordinary channel of a petition for a writ of mandamus. If petitioners' claims have merit, the District Court of Appeals has full authority to compel presentation of a full record and grant any relief that may be warranted, including further modification of the injunction. Therefore, this petition for writ of mandamus should be denied, and this Court should permit the state courts to consider petitioners' appeal in a more orderly fashion.

I.

A PETITION FOR A WRIT OF MANDAMUS IS INAPPROPRIATE IN THIS CASE BECAUSE AN APPEAL IS PENDING IN STATE COURT, THE CASE IS HIGHLY FACT-SPECIFIC, THIS COURT HAS NEVER SEEN THE FULL RECORD, AND THERE ARE NO SPECIAL CIRCUMSTANCES DICTATING EXTRAORDINARY REVIEW

The writ of mandamus is an extraordinary writ. According to a long line of case law, extraordinary writs "are drastic and extraordinary remedies," which are reserved for cases in which "appeal is a clearly inadequate remedy." *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947). Such writs are "sparingly exercised." *Parr v. United States*, 351 U.S. 513, 520 (1956). "The preemptory common-law writs are among the most potent weapons in the judicial arsenal. 'As extraordinary remedies, they are reserved for really extraordinary causes.'" *Will v. United States*, 389 U.S. 90, 107 (1967)(quoting *Ex Parte Fahey*, *supra*, 332 U.S. at 260).

This theme is emphasized throughout Supreme Court Rule 20, which discusses the considerations governing the issuance of extraordinary writs by this Court. According to Rule 20, the issuance of an extraordinary writ such as a writ of mandamus "is not a matter of right, but of discretion sparingly exercised." Sup. Ct. R. 20(1). Thus, a petition for a writ of mandamus "must show . . . that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." *Id.*

There are few "exceptional circumstances" justifying the "drastic" remedy of a writ of mandamus. "In accord with . . . historic practice, we have held that only 'exceptional circumstances amounting to a judicial "usurpation of power"' will justify issuance of the writ." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988)(quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953) and *United States v. Duell*, 172 U.S. 576, 582 (1899)). Petitioners have "the burden of showing that [their] right to issuance of the writ is 'clear and indisputable'." *Bankers Life*, *supra*, 346 U.S. at 384 (quoting *United States v. Duell*, *supra*, 172 U.S. at 582).

Petitioners have fallen far short of meeting their burden in this case. Petitioners have cited nothing even resembling a "judicial usurpation of power" by the Florida Circuit Court. Indeed, two factors make this an especially inappropriate case for the issuance of writ of mandamus. First, this case involves the application of a standard that requires the trial judge to exercise a significant amount of discretion. Second, petitioners have already filed an appeal to the state appellate court, which can provide them

with the full relief they request from this Court. Therefore, this is not a case in which "appeal is a clearly inadequate remedy." *Ex parte Fahey*, *supra*, 332 U.S. at 260.

With regard to the first factor, this Court has held that "[w]here a matter is committed to the discretion of a [trial court], it cannot be said that a litigant's right to a particular result is 'clear and indisputable,'" *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 665-66 (1978). *See also Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). Therefore, a writ of mandamus is inappropriate in cases involving the exercise of a significant amount of discretion by the trial court.

In *Madsen*, this Court noted that one of the advantages of an injunction is that it "can be tailored by a trial judge to afford more precise relief than a statute where a violation of the law has already occurred." *Madsen*, *supra*, 114 S.Ct. at 2524. This tailoring process necessarily involves the exercise of a significant amount of discretion by a trial judge, who holds evidentiary hearings and thus becomes intimately familiar with the facts of a particular case. In *Madsen*, the Court recognized the need for substantial trial court discretion in cases such as this, and noted that "some deference must be given to the state court's familiarity with the facts and the background of the dispute between the parties even under our heightened review." *Madsen*, *supra*, 114 S.Ct. at 2527 (citing *Milk Wagon Drivers v. Meadowmoor Diaries, Inc.*, 312 U.S. 287, 294 (1941)). The Court reaffirmed this principle this Term in *Schenck v. Pro-Choice Network of Western New York*, No. 95-1065, 1997 WL 65718 (U.S. Feb. 19, 1997): "Although one might quibble about whether 15 feet is too great or too small a distance if the

goal is to ensure access [to the clinic], we defer to the District Court's reasonable assessment of the number of feet necessary to keep the entrances clear." *Id.* at *12.

The broad grant of discretion to the trial court in cases such as this renders the present petition for a writ of mandamus inappropriate. Of course, the trial court's discretion is not unlimited. But the proper channels of reviewing the trial court's exercise of discretion must be followed to ensure that the factual circumstances taken into account by the trial court receive proper consideration by higher courts. Thus, petitioners' proper course is to file an appeal from the trial court's order (as petitioners in this case have already done), and proceed through the normal course of litigation.

The availability of full relief through appeal is the second factor rendering a writ of mandamus inappropriate in this case. One of the clearest principles of mandamus litigation is that writs of mandamus and other extraordinary writs "cannot be used as a substitute for appeals." *Bankers Life*, *supra*, 346 U.S. at 383; *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 27-28 (1943)("Ordinarily mandamus may not be resorted to as a mode of review where a statutory method of appeal has been prescribed or to review an appealable decision of record."). Thus, mandamus "should be resorted to only where appeal is a clearly inadequate remedy." *Ex parte Fahey*, *supra*, 332 U.S. at 260.

Petitioners' claims here amount to nothing more than a series of contentions that the trial court applied the new *Madsen* standard incorrectly. These claims are insufficient to circumvent the rule prohibiting parties from using mandamus as a substitute for ordinary appeals. "The writ of mandamus is not to be used when 'the most

that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction.'" *Schlagenhauf v. Holder*, 379 U.S. 104, 112 (1964)(quoting *Parr v. United States*, 351 U.S. 513, 520 (1956). The prohibition on using writs of mandamus as a substitute for appeal to challenge allegedly erroneous lower court judgments applies "even though hardship may result from delay and perhaps unnecessary trial." *Schlagenhauf, supra*, 379 U.S. at 110; *Bankers Life, supra*, 346 U.S. at 383. Petitioners have cited no additional hardships imposed on them in this case beyond the slight delay that is inevitable in every appeal. This falls far short of what is required for the unusual relief they request.

Petitioners have failed to cite even one reason why this case is different than an ordinary appeal. There is not the slightest indication of a "judicial usurpation of power" by the trial court or any other exceptional circumstance required by this Court's rules for granting an extraordinary writ. Petitioners have therefore failed to satisfy either the requirements of Supreme Court Rule 20 or the principles set forth in this Court's many precedents regarding the limited availability of extraordinary writs. Thus, a writ of mandamus is inappropriate in this case, and the present petition should be denied.

II.

THE TRIAL COURT'S MODIFIED AMENDED PERMANENT INJUNCTION COMPLIES WITH THIS COURT'S MANDATE

Petitioners claim that the trial court failed to comply with this Court's mandate in *Madsen*. There are two

aspects to this claim: first, that the trial court erred in failing to take new evidence at the hearing held after the remand, *see* Petition at 23-25, and second, that the specific provisions of the modified injunction are inconsistent with the law set forth in *Madsen*, *see* Petition at 7-23. As noted above, petitioners' simple claim that the trial court's order is erroneous is insufficient to support this petition for a writ of mandamus. But even if this Court were to reach the merits of petitioners' claim, it would be forced to reject their challenge to the modified injunction entered by the trial court.

Petitioners' claim is based on two inaccurate premises. The first inaccurate premise is petitioners' assertion that the trial court expanded the scope of the injunction after the remand from this Court's *Madsen* decision. *See* Petition at 4 (claiming that trial court "included additional restrictions" in modified injunction); *id.* at 8 (trial court "offered new, substantive restrictions" in modified injunction); *id.* at 17 (trial court "added further restrictions" to residential picketing portion of injunction); *id.* at 23 (trial court "exceeded this Court's Mandate by adding even further unconstitutional restrictions to free speech"). It would be difficult to discern from petitioners' characterization of the modified injunction that each aspect of the injunction to which petitioners object is significantly narrower in scope than the analogous provisions in the version of the injunction reviewed by this Court in *Madsen*. The trial court did not "add further unconstitutional restrictions" to the injunction; rather, the trial court narrowed previous provisions that had been found by this Court to "sweep more broadly than necessary to accomplish the permissible goals of the injunction." *Madsen*, *supra*, 114 S.Ct. at 2530.

The fact that petitioners mistakenly construe the modified injunction as violating this Court's mandate in *Madsen* by "adding restrictions" to speech highlights the second inaccurate premise of petitioners' claim. It is clear from the nature of their arguments that petitioners are operating under a serious misunderstanding about this Court's holding in *Madsen*. Petitioners seem to believe that this Court held in *Madsen* that the facts of this case could never justify an injunction provision narrowly regulating threats conveyed to clinic patients and employees, targeted picketing of residences of clinic staff, or harassment, threats, and physical abuse of patients and staff going to or from the clinic, even if this behavior occurred outside the 36-foot buffer specifically upheld in *Madsen*. Nothing in this Court's *Madsen* opinion comes close to this extreme position.

In *Madsen*, this Court did nothing more than hold that some provisions in the earlier version of the injunction were too broad in light of the limited record before the Court in that appeal. It must be reemphasized that in the *Madsen* appeal petitioners "studiously refrained from challenging the factual basis for the injunction both in the state courts and here," *Madsen*, *supra*, 114 S.Ct. at 2527, and therefore this Court's conclusions about the legitimate breadth of the injunction was necessarily limited by the Court's reference to "the record before us." *Madsen*, *supra*, 114 S.Ct. at 2528; *id.* at 2530.

In light of the fact that this Court's opinion was specifically addressed to a facial challenge to the earlier version of the injunction, rather than a challenge to the factual sufficiency of the record below to support the injunction, this Court's subsequent mandate remanding the case to the Florida courts "for further proceedings not in-

consistent with the opinion of this Court," *see* Petition, Appendix B, at B-1, offered the trial court two options. The trial court's first option was to support the existing provisions with specific references to evidence introduced in its three-day evidentiary hearing but not included in the record of the original appeal to this Court. The trial court's second option was to narrow the injunction provisions as much as possible, consistent with the continuing need to protect the interests of clinic patients and staff--which this Court specifically endorsed in *Madsen*. *See Madsen*, *supra*, 114 S.Ct. at 2526 ("We agree with the Supreme Court of Florida that the combination of these governmental interests is quite sufficient to justify an appropriately tailored injunction to protect them.") The trial court chose the latter course, and therefore carefully constructed the modified injunction provisions in issue here around the comments this Court made about the proper scope of an injunction, in light of the extensive evidence already accumulated in this case.

In addition to petitioners' challenge to specific provisions of the modified injunction (which will be addressed seriatim below), they also contend that this Court's mandate in *Madsen* obligated the trial court to take additional evidence before narrowing the injunction to comply with the principles stated in the *Madsen* decision. Petitioners specifically object that the modified injunction is invalid because "the trial court had no new evidence stating that the Petitioners have violated, or imminently will violate, some provision of statutory or common law." Petition at 25. Petitioners' assertion that the trial court must take new evidence before conforming the injunction to this Court's ruling has no basis in the *Madsen* opinion, and indeed is contrary to the clear implica-

tion of this Court's recognition in *Madsen* that it was dealing with a facial challenge to the injunction rather than a challenge to the sufficiency of the factual record to support the injunction. *See Madsen*, *supra*, 114 S.Ct. at 2527.

Contrary to petitioners' assertion, this Court's *Madsen* opinion did not magically erase the extensive evidence that the trial court has already assembled of the serious problems caused by the activities of petitioners and those acting in concert with them. Indeed, this Court held in *Madsen* that "[w]e must . . . judge this case on the assumption that the evidence and testimony presented to the state court supported its findings that the presence of protesters standing, marching, and demonstrating near the clinic's entrance interfered with ingress and egress from the clinic despite the issuance of the earlier injunction." *Madsen*, *supra*, 114 S.Ct. at 2528. The Court also took note of petitioners' violations of a previous injunction, *Madsen*, *supra*, 114 S.Ct. at 2520, and petitioners' continued harassment of clinic staff at home and on the way to and from the clinic. *Id.* The extensive evidence introduced during three days of testimony in the trial court amply supports the new, narrower provisions of the modified injunction. The trial court has no obligation to revisit facts that have already been proved true. If petitioners disagree, their remedy is not to obtain a writ of mandamus from this Court, but rather to pursue the appeal they have already filed (accompanied by a full record) to the Florida District Court of Appeal.

In addition to these basic misconceptions about the general meaning of this Court's *Madsen* decision, petitioners have also misconstrued the guidelines this Court provided regarding the legitimate scope of specific

provisions of the version of the injunction reviewed in *Madsen*. The broad outlines of petitioners' misconceptions with regard to each provision are set forth below.

A.

The 36-Foot Buffer Zone Around the Clinic

In the version of the injunction reviewed by this Court in *Madsen*, a central provision prohibited petitioners from "congregating, picketing, patrolling, demonstrating or entering" any portion of the public right-of-way or private property within 36 feet of the property line of the clinic. *Madsen*, *supra*, 114 S.Ct. at 2526. This Court's ruling on the 36-foot buffer zone was based on the particular configuration of the clinic. The southern edge of the clinic's property abuts a two-lane residential street named "Dixie Way"; the north and west edges of the clinic property are adjacent to private property; the east edge of the clinic property abuts the right-of-way of U.S. Highway One, a major four-lane highway. *See* Modified Amended Permanent Injunction, Petition Appendix C, at C-8 - C-9.

In *Madsen*, this Court upheld the portion of the 36-foot buffer zone along the southern edge of the clinic. The Court noted that the injunction created a "complete buffer zone" on the southern side of the clinic. *Madsen*, *supra*, 114 S.Ct. at 2527. The Court agreed with the state courts that "allowing the petitioners to remain on the clinic's sidewalk and driveway was not a viable option in view of the failure of the first injunction to protect access." *Id.* The Court held that the buffer zone burdened no more speech than necessary because "the buffer zone

was narrow enough to place petitioners at a distance of no greater than 10 to 12 feet from cars approaching and leaving the clinic." *Id.*

The Court struck down the application of the injunction to the private property on the northern and western edges of the clinic because "[p]atients and staff wishing to reach the clinic do not have to cross the private property abutting the clinic property on the north and west, and nothing in the record indicates that petitioners' activities on the private property have obstructed access to the clinic." *Id.* at 2528. The Court said nothing at all about the provisions of the injunction pertaining to the eastern edge of the clinic along U.S. Highway One.

In response to this Court's opinion, the modified injunction entered by the trial court specifically states that the 36-foot buffer "does not apply" to the property to the west and north of the clinic. Modified Amended Permanent Injunction, Petition Appendix C, at C-8. The other portions of this provision are unchanged from the previous version of the injunction. Petitioners' claim that the trial court has failed to comply with this Court's mandate is apparently a reference to the application of the buffer zone to the east side of the clinic. *See* Petition at 13-14. However, given the fact that this Court did not address that part of the injunction, it is difficult to understand how it could be part of the Court's mandate to the trial court.

Also, petitioners overlook the fact that, as written, the modified injunction contains an explicit exception to the 36-foot buffer zone for protesters along the right-of-way to U.S. Highway One. *Id.* at C-8. Since the provision in question does not bar protesters from the right-of-way of U.S. Highway One on the east side of the clinic,

the injunction does not burden petitioners' speech at all. Therefore, the provision necessarily conforms to the *Madsen* requirement that an injunction burden no more speech than necessary. The specific terms of the injunction permit protesters to address their protests to cars travelling south on Highway One on the way to the clinic. This provision permits precisely the same type of speech that already occurs on the southern side of the clinic adjacent to Dixie Way, which this Court specifically upheld against a First Amendment challenge in *Madsen*. Thus, the petitioners' challenge to the provision of the modified injunction regarding the east side of the clinic has no merit.

B.

The "Images Observable" Provision

In *Madsen*, this Court struck down a provision of the injunction that broadly prohibited "images observable to . . . patients inside the Clinic." *Madsen*, *supra*, 114 S.Ct. at 2522, 2528-29. On remand, the trial court strictly limited the "images observable" portion of the injunction to "images which convey threats, veiled or otherwise." Modified Amended Permanent Injunction, Petition Appendix C, at C-9. Petitioners contend that this Court's *Madsen* decision amounted to an absolute prohibition on any regulation of "images observable" from the clinic. *See* Petition at 15 ("Since the trial court only reworded the 'images observable' provision instead of striking it, the trial court violated this Court's Mandate.").

Petitioners have misinterpreted the *Madsen* decision, and ignore the fact that the trial court took the language of the modified injunction directly from the *Madsen*

majority opinion. This Court itself noted that "threats to patients or their families, however communicated, are proscribable under the First Amendment." *Madsen*, *supra*, 114 S.Ct. at 2529. The Court went on to suggest that instead of imposing a "blanket ban" on images observable, the trial court should have prohibited merely "the display of signs that could be interpreted as threats or veiled threats. . . ." *Id.* The trial court adopted this Court's suggestion verbatim when it drafted the modified injunction. Since the language of the modified injunction came from this Court's own opinion, petitioners cannot plausibly claim that the trial court failed to carry out the *Madsen* mandate.

C.

The Residential Picketing Provision

The trial court also took this Court's advice in narrowing the residential picketing portion of the injunction. In the version of the injunction reviewed by this Court, the residential picketing provision prohibiting picketing, demonstrating, or using sound amplification equipment within 300 feet of the residences of clinic staff. *See Madsen*, *supra*, 114 S.Ct. at 2529. This Court held that a total ban on picketing within 300 feet of residences was too broad. However, the Court also noted that "[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Madsen*, *supra*, 114 S.Ct. at 2530 (quoting *Frisby v. Schultz*, 487 U.S. 474, 484 (1988). The problem with the original residential picketing provision, the Court held, is that the total 300-foot

ban on picketing was not limited to "focused picketing taking place solely in front of a particular residence," *Madsen*, 114 S.Ct. at 2530, which the Court had previously recognized is subject to regulation under proper circumstances, *see Frisby*, *supra*. Therefore, this Court suggested, "it appears that a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result." *Madsen*, *supra*, 114 S.Ct. 2530.

This is precisely the approach taken on remand by the trial court. Instead of a total ban on picketing within 300 feet of clinic staff residences, the modified injunction substitutes a time limit (weekdays, except national holidays, from 10:00 a.m. to noon), a durational limit (two hours per day), and a limit on the number of pickets (no more than twenty-five picketers at any one time). Modified Amended Permanent Injunction, Petition Appendix C, at C-10. As long as they observe these limits, as well as a ban on threats and a prohibition on blocking access to any residence, picketers may protest directly across the street from the home of any clinic staff member. This provision of the modified injunction is far less intrusive into the speech rights of protesters than the total ban on focused picketing this Court upheld in *Frisby*, 487 U.S. 474, and thus easily satisfies the *Madsen* standard.

Petitioners seem to misunderstand what the modified injunction permits. According to petitioners, "Judge Brock not only kept the [300-foot buffer] zone, he also added new restrictions." Petition at 18. Petitioners thus seem to believe that the speech of protesters is more restricted under the present injunction than it was under the version reviewed by this Court in *Madsen*. On the contrary, the modified injunction permits a far greater

range of protests in close proximity to the residences of clinic staff than the previous provision that it replaces. The "new restrictions" to which petitioners refer are simply the sorts of narrow time, place, and manner provisions suggested by this Court as mechanisms for protecting the tranquility of staff homes while permitted reasonable pickets during a portion of each day.

Petitioners also attack a provision of the modified injunction that prohibits uninvited approaches to the homes of clinic staff. *See* Petition at 18-21. This provision was not addressed by the Court in *Madsen* and therefore is not part of the Court's mandate. In any event, petitioners' attempt to link this provision with the "uninvited contact" provision of the previous version of the injunction, which prohibited "uninvited contact" in public spaces within a 300-foot buffer zone around the clinic, is inconsistent with this Court's precedents holding that the interest in residential privacy justifies regulation of speech that the resident does not want to hear in his or her home. *See Rowan v. U.S. Post Office Dept.*, 397 U.S. 728 (1970). The First Amendment rules regarding uninvited contact on a public sidewalk are fundamentally different than the rules regarding uninvited contact in the sanctity of one's own home. This Court's decisions recognize that the home is an individual's only real refuge from the world, *see, e.g., Madsen, supra*, 114 S.Ct. at 2529, and the rules regarding uninvited contact in the home reflect that understanding.

D.

The Individual Harassment Provision

The final provision of the modified injunction challenged by petitioners deals with contact between protesters and clinic patients and staff in public spaces outside the 36-foot buffer zone surrounding the clinic. The relevant provision in the version of the injunction reviewed by this Court prohibited any uninvited contact in an area within 300 feet of the clinic. *Madsen*, *supra*, 114 S.Ct. at 2529. This Court struck this provision as burdening more speech than necessary, in that it prohibited all uninvited contact "regardless of how peaceful the contact may be. . . ." *Id.* The Court noted that "the 'consent' requirement alone invalidates this provision. . . ." *Id.* at 2529. In the modified injunction, the trial court eliminated the uninvited contact provisions that this Court found unconstitutional, and clearly gave protesters the right to approach persons outside the 36-foot clinic buffer zone. Modified Amended Permanent Injunction, Petition Appendix C, at C-9 - C-13.

Contrary to the implications of petitioners' argument, this Court did not suggest in *Madsen* that no restriction on abusive behavior was permissible outside the 36-foot buffer zone. On the contrary, this Court once again suggested an acceptably narrow alternative to the previously overbroad injunction provisions, and once again the trial court adopted the Court's suggestion.

This Court suggested that a sustainable provision dealing with contact between protesters and clinic patients and staff would be limited to speech "that is independently proscribable (i.e., 'fighting words' or threats), or is so in-

fused with violence as to be indistinguishable from a threat of physical harm. . . ." *Id.* This limited restriction on abusive conduct is the gist of the relevant new provision of the modified injunction. The new provision specifically permits uninvited contact (thus eliminating the objectionable provision from the previous injunction), but notes that persons approached by protesters have the absolute right to walk away, and protesters "shall not encircle, surround, impede the progress or, harass, threaten or physically or verbally abuse those individuals who choose not to communicate with them." Modified Amended Permanent Injunction, Petition Appendix C, at C-9 - C-10. This is the very type of conduct that is "so infused with violence as to be indistinguishable from a threat of physical harm," and thus is permissible under this Court's *Madsen* opinion.

With regard to this and other specific provisions of the modified injunction to which petitioners object, petitioners insist that the trial court's sole function on remand was to delete entire provisions of the injunction. They insist that the judge was obligated to use only an eraser and not a pen. They complain that any attempt to rephrase the injunction to comply with the *Madsen* decision violates this Court's mandate. Respondents agree that the trial court deleted unconstitutional provisions and significantly revised the remainder of the injunction, but strongly disagree that a sincere effort to incorporate this Court's suggestions and recommendations could logically be construed as a violation of this Court's mandate.

CONCLUSION

The petition for a writ of mandamus should be denied.

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